No. 17-646

IN THE
Supreme Court of the United States

TERANCE MARTEZ GAMBLE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE U.S. NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION, U.S. COAST GUARD OFFICE OF MEMBER ADVOCACY AND LEGAL ASSISTANCE—APPELLATE DEFENSE, U.S. AIR FORCE APPELLATE DEFENSE DIVISION, AND U.S. ARMY DEFENSE APPELLATE DIVISION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Thompson v. United States,
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Taylor v. Louisiana,
419 U.S. 522 (1975) 11
Whelchel v. McDonald, 340 U.S. 122 (1950) 7

United States Court of Appeals for the Armed Forces

United States v. Bertie, 50 M.J. 489 (C.A.A.F. 1999) 10

United States v. Christensen, 78 M.J. 1 (C.A.A.F. 2018) 24, 26

United States v. Cuellar, 27 M.J. 50 (C.M.A. 1989) 5

United States v. Dowty, 60 M.J. 163 (C.A.A.F. 2004) 9-10

United States v. Easton, 71 M.J. 168 (C.A.A.F. 2012) 19

United States v. Fischer, 61 M.J. 415 (C.A.A.F. 2005) 24

United States v. Gooch, 69 M.J. 353 (C.A.A.F. 2010) 10

United States v. Kohut, 44 M.J. 245 (C.A.A.F. 1996) 6, 22, 27

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United States v. Roland, 50 MJ 66 (C.A.A.F. 1999) 11

United States v. Schneider, 38 M.J. 387 (C.A.A.F. 1993) 5

United States Military Courts of Criminal Appeal

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United States v. Culpepper, No. ACM 34058, 2002 WL 13154 (A.F. Ct. Crim. App., Dec. 11, 2001) 22

United States v. Greening, No. 201700040, 2018

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United States v. Hennis, 75 M.J. 796 (A. Ct. Crim. App. 2016) 1, 23
United States v. Lemasters, No. 20111143, 2013 WL 6913001 (A. Ct. Crim. App. Dec. 31, 2013) 11-12
United States v. Williams, No. 201200248, 2013 WL 1808733 (N-M. Ct. Crim. App. Apr. 30, 2013) 13
Webb v. United States, 67 M.J. 765 (A.F. Ct. Crim. App. 2009) 24

Other Court Cases

Batts v. Commonwealth, 515 S.E.2d 307 (Va. Ct. App. 1999) 13
Tillery v. Shartle, No. CV 16-0204-TUC-CKJ (LAB), 2016 WL 7229139 (D. Ariz. Dec. 14, 2016) 20
United States v. Snell, 592 F.2d 1083 (9th Cir. 1979) 21

Federal Statutes

10 U.S.C. § 688 (2012) 23
10 U.S.C. § 802 (2012) 2, 3, 23-24
10 U.S.C. § 803 (2012) 2
10 U.S.C. § 816 (2012) 8
10 U.S.C. § 818 (2012) 8, 15
10 U.S.C. § 822 (2012) 5
10 U.S.C. § 825 (2012) 2, 10
10 U.S.C. § 833 (2012) 18
10 U.S.C. § 844 (2012) 18
10 U.S.C. § 852 (2012) 2, 8-9, 13
10 U.S.C. § 856 (2012) 15
10 U.S.C. § 867 (2012) 1
10 U.S.C. § 870 (2012) 1
10 U.S.C. § 906 (2012) 8

10 U.S.C. § 920 (2012) 15
10 U.S.C. § 920b (2012) 15
10 U.S.C. § 925 (2012) 15
10 U.S.C. § 934 (2012) 33
10 U.S.C. § 1168 (2012) 24

Legislation and Executive Orders

Act of Sept. 29 1789, Ch. 25, 1 Stat. 95..... 29
American Articles of War of 1776 (Sept. 20, 1776).. 29
Exec. Order No. 13,825, 83 Fed. Reg. 9889 (Mar. 1, 2018)..... 8
NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). 2, 6, 8-9, 18

State Constitutional Provisions and Statutes

LA. CONST. art. I, § 17..... 9
OR. REV. STAT. § 136.450 (2015)..... 9
VA CODE ANN. § 19.2-295.1 (2012)..... 12
VA CONST. Art. I, Sec. 8 12

Rules for Courts-Martial

RULE FOR COURTS-MARTIAL 202 24
RULE FOR COURTS-MARTIAL 907 5
RULE FOR COURTS-MARTIAL 907 10

Other Authorities

Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995)..... 33

Aliza B. Kaplan and Amy Saack, *Overturning Apodaca v. Oregon Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1 (2016)..... 9

Ashley Garcia, *Patching the Exhaust Pipe: A Historical Analysis of Oregon's Non-Unanimous Jury Law in Criminal Cases*, 54 WILLAMETTE L. REV. 113 (2017) 9

Charles Gazaway, *Military panel finds murder suspect Brent Burke guilty on all charges*, WAVE 3 NBC NEWS (May 8, 2012), http://www.wave3.com/story/18184922/military-panel-reaches-finding-in-court-martial-of-double- murder-suspect-brent-burke 25

CODE COMMITTEE ON MILITARY JUSTICE, ANNUAL REPORT FOR THE PERIOD OCTOBER 1, 2016 TO SEPTEMBER 30, 2017, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY17AnnualReport.pdf 1

Corinne Reilly, *Killer again charged with murder, this time by Navy*, THE VIRGINIAN-PILOT (Jul. 9, 2011), https://pilotonline.com/news/military/article_a569a3a8-e9cf-51c1-8bdb-1a8968805a08.html 13

DEP'T OF THE AIR FORCE, Air Force Instruction 51-201, at 35, ¶ 2.18.3 (Dec. 8, 2017), *available at* http://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-201/afi51-201.pdf 15, 18

DEP'T OF THE ARMY, Army Regulation 27-10 Legal Services: Military Justice, at 29, Ch. 4, ¶ 4-1 (May 11, 2016), *available at* https://armypubs.army.mil/ProductMaps/PubForm/AR_Details.aspx?ID=09028518003514c 14

DEP'T OF DEFENSE, FY 2017 DOD Statistical Report on the Military Retirement System at 162 (Jul. 2018), *available at* https://actuary.defense.gov/LinkClick.aspx?fileticket=SsTsvHFcjaE%3D&tabid=1804&portalid=15 2

DEP'T OF THE NAVY, JAG INSTRUCTION 5800.7C (1992) 6

DEP'T OF THE NAVY, JAG INSTRUCTION 5800.7D (2004) (on file with counsel of record) 6

DEP'T OF THE NAVY, JAG INSTRUCTION 5800.7E (2007), available at https://www.newriver.marines.mil/Portals/17/Documents/JAGINST%205800.7E.pdf 6

DEP'T OF THE NAVY, JAG INSTRUCTION 5800.7F, *available at* ww.jag.navy.mil/library/instructions/JAGMAN2012.pdf (2012) 5-6, 14, 19

DEP'T OF THE NAVY, MILITARY PERSONNEL MANUAL (MILPERSMAN) 24, 34

DEP'T OF THE NAVY, Secretary of the Navy Instruction 1920.6C (2011) 34

Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1 (1997) 32

Letter from Captain Robert P. Monahan Jr., Judge Advocate General's Corps, U.S. Navy, Office of the Judge Advocate General, U.S. Navy, to Lieutenant Daniel Rosinski, JAG Corps, U.S. Navy (Aug. 8, 2018) (on file with counsel of record) 5-6

Letter from Captain V. Tasikas, U.S. Coast Guard, Office of Military Justice, to Lieutenant Salomee Briggs, U.S. Coast Guard (Aug. 21, 2018) (on file with counsel of record) 6

Major Charles L. Prichard, Jr., *The Pit and the Pendulum: Why the Military Must Change Its Policy Regarding Successive State-Military Prosecutions*, 414 ARMY LAWYER 1 (Nov. 2007)..... 19-20, 23, 33-34

Mat dos Santos, AMERICAN CIVIL LIBERTIES UNION OF OREGON, *Non-Unanimous Jury Convictions Violate Equal Protection Clause* (Dec. 15, 2016) https://www.aclu-or.org/en/cases/non-unanimous-jury-convictions-violate-equal-protection-clause.. 9

Offices of the U.S. Attys, DEP'T OF JUSTICE, *United States Attorneys' Manual* § 9-2.031 (2009), *available at* https://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031 ..... 3, 16-18, 21

UNITED STATES COAST GUARD, COMDTINST M5810.1F, 60-61, ¶ 4.D.1 (Mar. 2018), *available at* https://media.defense.gov/2018/Apr/06/2001900284/-1/-1/0/CIM_5810_1F.PDF..... 15, 20

W. WINTHROP, MILITARY LAW AND PRECEDENTS 964 (2d ed. 1920)..... 29-31

WRAL.COM, Man Accused of Murdering Lover's Husband Faces Court Martial (May 12, 2003), https://www.wral.com/news/local/story/105214/..... 20

INTEREST OF *AMICI CURIAE*[1]

The United States Navy-Marine Corps Appellate Defense Division, United States Coast Guard Office of Member Advocacy and Legal Assistance—Appellate Defense, United States Air Force Appellate Defense Division, and United States Army Defense Appellate Division, represented more than 1,845 military members and others tried by court-martial in the last fiscal year alone.[2]

Some, like Navy Petty Officer Austin Greening[3] and Retired Army Master Sergeant Timothy Hennis, were convicted at court-martial for offenses first tried in state court under the separate-sovereigns exception to the Double Jeopardy Clause—in Hennis' case, he was sentenced to death *after* acquittal by a state jury.[4]

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[1] Counsel for all parties have consented to filing of this brief. In accordance with Supreme Court Rules 37.4 and 37.6, *amici curiae* are authorized legal representatives of their respective Appellate Defense units, and are authorized by law to appear before this Court under 10 U.S.C. § 870(c) (2012).

[2] CODE COMMITTEE ON MILITARY JUSTICE, ANNUAL REPORT FOR THE PERIOD OCTOBER 1, 2016 TO SEPTEMBER 30, 2017, at 46, 106, 115, 134, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY17AnnualReport.pdf.

[3] *United States v. Greening*, No. 201700040, 2018 WL 154779 (N-M. Ct. Crim. App. Mar. 30, 2018), *rev. granted*, __M.J.__ (C.A.A.F. July 24, 2018). The Navy tried Petty Officer Greening for "involuntary manslaughter and obstruction of justice" after he "pleaded guilty to involuntary manslaughter" in an "agreement with the Commonwealth [of Virginia]". *Id.* at *1, *4. The Court of Appeals for the Armed Forces ("CAAF") granted review on the Double Jeopardy issue raised here by Mr. Gamble.

[4] *United States v. Hennis*, 75 M.J. 796, 802-03 (A. Ct. Crim. App. 2016). The CAAF will review this case per 10 U.S.C. § 867(a).

Amici ask this Court to overrule the separate-sovereigns exception so those who served our country receive the proper Double Jeopardy protections of the Constitution, our basic charter of rights to which they took an oath to defend with their lives.

SUMMARY OF ARGUMENT

For the millions of active duty military members,[5] active duty retirees,[6] and others subject to the Uniform Code of Military Justice ("UCMJ"),[7] the separate-sovereigns exception not only allows another "bite at the apple" after a state trial: it slices the apple into "bite sized" pieces for the government. This is because the separate-sovereigns exception allows the military to overrule the verdict of a state jury, with its jurors selected from a representative cross-section of the community, by meeting a lesser standard: currently a two-thirds majority vote for conviction by a panel of military members, each senior to the defendant and picked by the defendant's commander.[8] And the military does this at the discretion of *non-attorney* commanding officers, unconstrained by any restrictions comparable to the *Petite* Policy regulating

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[5] Congress authorized an active duty military of 1,305,900 personnel. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017, Pub. L. No. 114-328, § 401, 130 Stat. 2000, 2091 (2016) [hereinafter FY 2017 NDAA].

[6] As of Sept. 30, 2017, there were 1,587,780 non-reservist retirees receiving retired pay. DEP'T OF DEFENSE, FY 2017 DOD Statistical Report on the Military Retirement System at 162 (Jul. 2018), *available at* https://actuary.defense.gov/LinkClick.aspx?fileticket=SsTsvHFcjaE%3D&tabid=1804&portalid=15.

[7] 10 U.S.C. §§ 802, 803 (2012) (listing those subject to UCMJ).

[8] *See id.* §§ 825(c)(1), 825 (d)(1-2), 852(a)(2) (2012).

the United States Department of Justice (DOJ).[9]

Moreover, retired active duty military, and some members of the active duty military suffer a heightened form of the "continuing state of anxiety and insecurity" caused by successive prosecutions.[10] This occurs when the military departments court-martial retirees long after they have left the active duty military, and when they involuntarily extend enlistments beyond the expiration of a service obligation for the sole purpose of carrying out a successive prosecution.[11] The separate-sovereigns exception thus allows the military to hold members at their duty station—often far from a member's home and family, and sometimes in pretrial detention—for a successive court-martial, long after the member has completed his or her contractual service obligation.[12]

Finally, a "factual premise"[13] for use of the

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[9] Brief for the United States in Opposition at 11, *Gamble v. United States*, No. 17-646 (Jan. 2018) (citing Offices of the U.S. Attys, DEP'T OF JUSTICE, *United States Attorneys' Manual* § 9-2.031 (2009), *available at* https://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031 [hereinafter *USAM*]).

[10] Brief for Petitioner at 27, *Gamble v. United States*, No. 17-646 (Sept. 4, 2018) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)) [hereinafter Brief for Petitioner].

[11] 10 U.S.C. § 802(a) (2012) (noting that "[m]embers of . . . the armed forces, including those awaiting discharge after expiration of their terms of enlistment" are subject to court-martial).

[12] *E.g.*, *Greening*, 2018 WL 1547779, at *2 (noting that Petty Officer Greening's command informed him of the involuntary extension of his enlistment, "and that the action was taken with a view towards trial by court-martial") (quotation omitted).

[13] Brief for Petitioner at 42.

separate-sovereigns exception to the Double Jeopardy Clause for successive prosecutions at courts-martial—that there is almost no overlap between the state and military judicial systems—is obsolete. The Articles of War governing the Army during and after passage of the Double Jeopardy Clause addressed military offenses not punishable under state law, and required commanding officers to support state jurisdiction over state law offenses. However, the UCMJ now in effect not only proscribes a wide variety of crimes, both military and civil in nature, it allows for court-martial for assimilated violations of federal and state laws. The Framers could not have intended servicemembers to be tried by both a court-martial and a state trial for the same alleged criminal act, as the separate-sovereigns exception has authorized.

ARGUMENT

I. THE SEPARATE-SOVEREIGNS EXCEPTION SHOULD BE OVERRULED BECAUSE IT LOWERS THE GOVERNMENT'S BURDEN BY ALLOWING RETRIAL AT COURT-MARTIAL ON A NON-LAWYER'S DECISION, WITHOUT STATE COURT PROTECTIONS.

Military courts-martial "can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service."[14] "As a result, the jurisdiction" of courts-martial "overlaps substantially with that of

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[14] *Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018) (citations omitted).

state . . . courts."[15] This means that a person subject to the UCMJ can "be re-prosecuted by the military" under the separate-sovereigns exception for the same alleged criminal acts—even after a judgement of acquittal by a state court.[16]

Courts-martial for the same alleged criminal acts previously tried in a state court (hereinafter referred to as "successive courts-martial") are poorly regulated. There is no military-wide regulation restricting the ability of military convening authorities—who are the non-lawyer initiators of all courts-martial in the military justice system—to convene a successive court-martial.[17]

Of the different military departments, only the Department of the Navy[18] and the Coast Guard have

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[15] *Ortiz*, 138 S. Ct. at 2170 (citations omitted).

[16] *United States v. Schneider*, 38 M.J. 387, 392 (C.A.A.F. 1993) (citing *Heath v. Alabama*, 474 U.S. 82 (1985)); *see also United States v. Cuellar*, 27 M.J. 50, 55 (C.M.A. 1989) ("[U]ntil Congress legislates to the contrary, a court-martial is not collaterally estopped by the outcome of a trial in a state court."). A previous "federal civilian court" trial "for the same offense" precludes a successive court-martial. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 907(b)(2), (2016).

[17] A convening authority is almost always a uniformed officer of the defendant's service. 10 U.S.C. § 822 (2012) (listing civilians and officers authorized to "convene general courts-martial").

[18] *See* DEP'T OF THE NAVY, JAG INSTRUCTION 5800.7F (*hereinafter* "JAGMAN") §§ 0124(c)(1) (2012), *available at* www.jag.navy.mil/library/instructions/JAGMAN2012.pdf (requiring notification of a Navy successive court-martial by the convening authority to OJAG); Letter from Captain Robert P. Monahan Jr., Judge Advocate General's ("JAG") Corps, U.S. Navy, Office of the Judge Advocate General ("OJAG"), U.S. Navy,

centrally tracked their convening authorities' use of successive courts-martial.[19] The Departments of the Army and the Air Force have not centrally tracked use of successive courts-martial. The Department of the Navy—with far less than half of the total number of active duty military members[20]—has conducted roughly two successive courts-martial per year.[21]

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to Lieutenant Daniel Rosinski, JAG Corps, U.S. Navy (Aug. 8, 2018) (on file with counsel of record) [hereinafter Navy Letter].

[19] *See* Letter from Captain V. Tasikas, U.S. Coast Guard, Office of Military Justice, to Lieutenant Salomee Briggs, U.S. Coast Guard (Aug. 21, 2018) (on file with counsel of record) (stating that the Coast Guard only centrally tracked successive court-martial requests between 2007 and February 2016, and that it conducted three successive courts-martial in this time).

[20] Congress authorized an active duty end-strength of 508,900 between the Navy and Marine Corps, out of 1,305,900 total active duty forces. FY 2017 NDAA § 401, 130 Stat. at 2091.

[21] *See* Navy Letter (reporting 42 successive courts-martial between 1992 and 2018, an average of 1.6 courts-martial per year). This figure is an underestimate because it only includes successive courts-martial by Marine Corps convening authorities between 1992 and 2007, when they had to request permission through OJAG. *Compare* DEP'T OF THE NAVY, JAG INSTRUCTION 5800.7D §§ 0124(c)(1) (2004) (on file with counsel of record) and *United States v. Kohut*, 44 M.J. 245, 246-47 (C.A.A.F. 1996) (quoting DEP'T OF THE NAVY, JAG INSTRUCTION 5800.7C §§ 0124(c)(1) (1992) (requiring Marine Corps convening authorities to request permission through OJAG for successive courts-martial)), *with* DEP'T OF THE NAVY, JAG INSTRUCTION 5800.7E §§ 0124(c)(1) (2007), *available at* https://www.newriver.marines.mil/Portals/17/Documents/JAGINST%205800.7E.pdf *and* JAGMAN 5800.7F, *supra* note 18, §§ 0124(c)(1) (only requiring notifications of successive courts-martial within Marine Corps by Marine convening authorities). Since the 2007 JAGMAN change, the Marine Corps has not tracked successive courts-martial by its convening authorities.

Use of the separate-sovereigns exception in successive courts-martial is especially likely to "permit[] the two components of our federal system to conspire together to deprive an individual of liberty where a single government would be powerless to do so."[22] The first reason for this is that convening authorities have a greater chance for conviction in a successive court-martial than the DOJ in a successive prosecution because courts-martial do not provide the jury protections constitutionally required in a prior state trial. The second is that the Department of Defense (DOD) does not sufficiently regulate successive courts-martial to ensure convening authorities use this extreme measure selectively.

A. The lack of a strong jury trial right in courts-martial incentivizes the use of successive courts-martial after a state trial.

Though courts-martial are "judicial" in nature,[23] this Court has not required them to provide the right to a jury trial that the Sixth Amendment guarantees to state court criminal defendants.[24]

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[22] Reply Brief for Petitioner at 8, *Gamble v. United States*, No. 17-646 (Jan. 30, 2018) (citing *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting)) [hereinafter Reply Brief].

[23] *Ortiz*, 138 S. Ct. at 2174 (claiming that the "procedural protections afforded to a service member are virtually the same as those given in a civilian criminal proceeding . . . state or federal"). Courts-martial may afford virtually the same types of procedural protections available in state courts, but in many respects (including the jury right) they are *inferior* protections.

[24] *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) ("The right to trial by jury . . . is not applicable to trials by courts-martial.") (citations omitted); *cf. Duncan v. Louisiana*, 391 U.S. 145, 162

Court-martial defendants tried at a general court-martial,[25] which may impose felony-level punishments,[26] only have a statutory right to a determination of their guilt or innocence by "members panels."[27] Two major differences between these panels and juries lower the burden to achieve a conviction in a successive court-martial.

First, general courts-martial may convict a defendant with a lower percentage of members voting for conviction than any of the fifty states allow for a felony jury verdict. Congress currently requires only "two-thirds of the members" to vote for conviction, in order for a panel to find a court-martial defendant guilty of any offense, except spying.[28] The changes Congress passed in the Military Justice Act (MJA) of 2016[29] still only require three-fourths of the members

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(1968) (incorporating most of the Sixth Amendment right to a jury trial against state governments trying defendants for serious criminal cases).

[25] A general court-martial may "adjudge any punishment not forbidden by" the UCMJ, "including the penalty of death when specifically authorized." 10 U.S.C. § 818 (2012).

[26] Military courts have recognized this analogy between offenses tried at general courts-martial and "felony offenses." *United States v. Mitchell*, 58 M.J. 446, 448 n.3 (C.A.A.F. 2003) (quotation and citation omitted).

[27] 10 U.S.C. § 816 (2012). A defendant also has the right, in a non-capital case, to elect trial by judge alone. *Id.*

[28] *Id.* § 852(a)(2) (2012). The only offense requiring a unanimous vote for conviction is that "for which the death penalty is made mandatory." *Id.* § 852(a)(1). The only such offense, spying, *see id.* § 906, is an offense federal in nature.

[29] FY 2017 NDAA, §§ 5001-5542, 130 Stat. at 2894-2968. These MJA amendments "take effect on January 1, 2019." Exec. Order No. 13,825, 83 Fed. Reg. 9889, 9889 (Mar. 1, 2018).

(on a general court-martial panel that will be required to have eight members) to vote for conviction.[30]

By contrast "only two states," Oregon and Louisiana, permit any felony "convictions on less-than-unanimous jury verdicts."[31] Even these states require unanimity in at least some murder trials; and for all felonies, they require *more* than three-fourths of jurors to vote for conviction for a guilty verdict.[32]

The second jury right court-martial defendants lose in a successive court-martial is the right to a jury pool representative of the community where the alleged crime occurred. A court-martial defendant has "no right to have a court-martial be a jury of peers, a representative cross-section of the community, or

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[30] FY 2017 NDAA, § 852, 130 Stat. at 2916 (modifying 10 U.S.C. § 852(a) to require the "concurrence of at least three-fourths of the members" for a court-martial conviction).

[31] Aliza B. Kaplan and Amy Saack, *Overturning Apodaca v. Oregon Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1, 6 (2016); *accord* Ashley Garcia, *Patching the Exhaust Pipe: A Historical Analysis Of Oregon's Non-Unanimous Jury Law in Criminal Cases*, 54 WILLAMETTE L. REV. 113, 135 (2017) (citing Mat dos Santos, AMERICAN CIVIL LIBERTIES UNION OF OREGON, *Non-Unanimous Jury Convictions Violate Equal Protection Clause* (Dec. 15, 2016) https://www.aclu-or.org/en/cases/non-unanimous-jury-convictions-violate-equal-protection-clause ("Only two states allow non-unanimous juries to deliver felony convictions: Oregon and Louisiana.")).

[32] La. CONST. art. I, § 17 (requiring a 10-2 vote for conviction in non-capital felony criminal cases); Kaplan and Saack, *supra* note 31 (citing OR. REV. STAT. § 136.450(1) (2015) (requiring a 10-2 vote for conviction "in a criminal action," except for "murder or aggravated murder").

randomly chosen."[33] The convening authority—the defendant's commanding officer—selects ("details") the military personnel who, after the court screens them for bias in the *voir dire* process, serve as the panel members for the defendant's case.[34]

The convening authority may detail, subject to very few restrictions, those who are "in *his [or her] opinion* . . . best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[35] The convening authority does not have to detail a representative group of members based on criteria of race, gender, or religion,[36] nor does the group of members have to be representative of a variety of military ranks or

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[33] *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004).

[34] 10 U.S.C. § 825 (2012) (describing detailing process); R.C.M. 912 (rules for *voir dire* screening for bias).

[35] 10 U.S.C. § 825 (emphasis added). A commissioned officer defendant must have an all commissioned officer panel; an enlisted defendant cannot be tried by a member of his immediate unit, and may require (absent "physical conditions or military exigencies") at least one-third of panel members to be enlisted. *Id.* Also, "[w]hen it can be avoided, no" defendant "may be tried by a court-martial any member of which is junior to him in rank or grade." *Id.* A convening authority cannot detail members on criteria outside Section 825 (i.e. gender), *United States v. Riesbeck*, 77 M.J. 154, 158-59 (C.A.A.F. 2017); solicit volunteers, *Dowty*, 60 M.J at 176; or, purposefully detail "members of senior grades or ranks to achieve a desired result," *United States v. Bertie*, 50 M.J. 489, 492 (C.A.A.F. 1999).

[36] *United States v. Gooch*, 69 M.J. 353, 356, 359 (C.A.A.F. 2010) (finding that absent proof of "improper motive" to exclude members based on race, a convening authority could use screening criteria precluding the detail of almost all members of Lieutenant Colonel Gooch's minority racial group to his trial).

occupations.[37]

By contrast, both state court and federal court defendants have a "fundamental" constitutional right to the "selection of a petit jury from a representative cross section of the community."[38] This Court has noted that a jury's "purpose" to "guard against the exercise of arbitrary power" is "not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."[39]

Two recent examples show how the lack of strong jury rights in a court-martial allows "the two components of our federal system" to use successive courts-martial "to conspire together to deprive an individual of liberty where a single government would be powerless to do so."[40] The first case is that of Army Private Seth Lemasters, first tried in Gloucester County, Virginia, for rape "by force or threat in violation of Virginia law. A jury acquitted [Private Lemasters] of the charge and the court ordered him released from civilian confinement."[41]

Private Lemasters' liberty should have been

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[37] *United States v. Roland*, 50 MJ 66, 69-70 (C.A.A.F. 1999) (convening authority need only establish that he or she considered detailing members from all ranks or occupations).
[38] *Taylor v. Louisiana*, 419 U.S. 522, 528-30 (1975).
[39] *Id.* at 529.
[40] Reply Brief, *supra* note 22, at 8.
[41] *United States v. Lemasters*, No. 20111143, 2013 WL 6913001, at *1-2 (A. Ct. Crim. App. Dec. 31, 2013), *rev. denied*, 73 M.J. 408 (C.A.A.F. 2014).

preserved by Virginia's requirement that a jury—drawn from the district where the alleged crime occurred—unanimously find that the prosecution met its burden of proof.[42] However, Virginia prosecutors played another card: the separate-sovereigns exception. They had "discussed [Private Lemasters'] case with the military trial counsel and appellant's company commander," ensuring that these officers "were present during the civilian trial," and then:

> At the conclusion of the trial, [Private Lemasters] was turned over to his company commander, who . . . ordered him into pretrial confinement. Fourteen days later charges were preferred against [him]. He was eventually tried by court-martial and convicted by an officer and enlisted panel of the aggravated sexual assault. . . .[43]

The second case is that of Navy Chief Rodney Williams. After finding Chief Williams guilty of voluntary manslaughter, a Virginia jury sentenced[44]

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[42] VA CONST. Art. I, Sec. 8 ("That in criminal prosecutions a man hath a right . . . to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty.").

[43] *Lemasters*, 2013 WL 6913001, at *2.

[44] *See* VA CODE ANN. § 19.2-295.1 (2012) ("In cases of trial by jury, upon a finding that the defendant is guilty of a felony. . . a separate proceeding limited to the ascertainment of punishment shall be held as soon as practicable before the same jury . . . . If the jury cannot agree on a punishment, the court shall impanel a different jury to ascertain punishment . . . ."). "The trial judge

him to twelve months in prison and a fine.[45] But that was not the end of Chief Williams' ordeal: a Navy prosecutor also attended the state trial,[46] and the Navy court-martialed him for the same acts. The members convicted him of voluntary manslaughter, a verdict requiring only two-thirds of the members to convict, and sentenced him to five years' in jail and a bad-conduct discharge—also on a two-thirds vote.[47]

The separate-sovereigns exception allowed Virginia to accomplish with military assistance what it could not alone—imprison Private Lemasters for ten years after his acquittal by a Virginia jury, and imprison Chief Williams for five additional years—for cases found wanting by juries requiring unanimity. This Court should overrule the separate-sovereigns exception. It allows for retrial at a court-martial requiring fewer factfinders to be convinced beyond a reasonable doubt of guilt or punishment after the military gets a free preview of the defendant's case.

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may reduce a sentence but may not exceed the 'maximum punishment' fixed by the jury," making the jury sentence a binding maximum requiring unanimity. *Batts v. Commonwealth*, 515 S.E.2d 307, 315 (Va. Ct. App. 1999).

[45] Corinne Reilly, *Killer again charged with murder, this time by Navy*, THE VIRGINIAN-PILOT (Jul. 9, 2011), https://pilotonline.com/news/military/article_a569a3a8-e9cf-51c1-8bdb-1a8968805a08.html ("[Chief] Williams . . . was . . . . Guilty of voluntary manslaughter, the jury said, punishable by up to a decade in prison. But when the panel came back . . . with a sentencing recommendation, it suggested . . . 12 months, and a . . . fine.").

[46] *United States v. Williams*, No. 201200248, 2013 WL 1808733 at *2 (N-M. Ct. Crim. App. Apr. 30, 2013), *rev. denied*, 72 M.J. 456 (C.A.A.F. 2013).

[47] *Id.* at *1; *see* 10 U.S.C. § 852(c) (requiring two-thirds verdict for sentences less than death, and more than ten years' in jail).

B. Unlike the DOJ's *Petite* Policy, which places uniform limits on successive federal prosecutions, the military departments place non-uniform and insubstantial restrictions on successive courts-martial.

Unlike the different United States Attorneys' offices, each military department has its own policy on successive courts-martial. Most require no higher level of approval for a successive court-martial than for an ordinary general court-martial. And unlike the DOJ, no military department requires approval of a successive prosecution by an attorney.

1. No department follows the DOJ's *Petite* Policy of requiring a high-level attorney to approve a successive prosecution.

Three military departments only require approval from a general court-martial convening authority ("GCMCA")—a non-lawyer—for successive courts-martial: the Army,[48] Navy and Marine Corps,[49]

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[48] DEP'T OF THE ARMY, Army Regulation ("AR") 27-10 Legal Services: Military Justice, at 29, Ch. 4, ¶ 4-1 (May 11, 2016), *available at https://armypubs.army.mil/ProductMaps/PubForm/AR_Details.aspx?ID=0902c8518003514c* (providing that for "disciplinary proceedings subsequent to exercise of jurisdiction by civilian authorities," the officer "exercising [general court-martial] jurisdiction, may, at that officer's discretion, dispose of such charges or, by endorsement, authorize" a successive special or general court-martial).

[49] JAGMAN, *supra* note 18, §§ 0124(a), (c)(1) (requiring that when "a person in the Naval service has been tried in a state" court," no such case "for the same act or acts" will "be referred for trial by court-martial . . . without the prior permission of the first

and Coast Guard.[50] Only the Air Force requires a senior civilian—the Secretary of the Air Force—to approve all successive courts-martial.[51]

Across the DOD, a GCMCA already has to approve referral of *any* case to a general court-martial—the only court-martial authorized to impose felony-level punishments[52] and to try all penetrative sexual assault offenses.[53] The Army, the Navy and Marine Corps, and in most circumstances the Coast Guard,[54] require *no* additional approval for successive

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GCMCA over the member"). Since enacting this version of the instruction in 2007, the Navy only requires notification by a Navy GCMCA to the Office of the Judge Advocate General. *Id.*

[50] UNITED STATES COAST GUARD, COMDTINST M5810.1F, 60-61, ¶ 4.D.1 (Mar. 2018), *available at* https://media.defense.gov/2018/Apr/06/2001900284/-1/-1/0/CIM_5810_1F.PDF ("No person in the Coast Guard may be tried for the same acts . . . for which the accused has been tried or is pending trial by [a] state . . . without first obtaining authorization from the appropriate Area Commander *or* [Deputy Commandant for Mission Support] DCMS."). Both Area Commanders, and the DCMS, are GCMCAs in the Coast Guard. *Id.* at 64 ¶ 5.A.

[51] DEP'T OF THE AIR FORCE, Air Force Instruction ("AFI") 51-201, at 35 2. ¶ 18.3 (Dec. 8, 2017), *available at* http://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-201/afi51-201.pdf ("Only the Secretary of the Air Force may approve initiation of court-martial . . . against a member previously tried by a state or foreign court for substantially the same act or omission, regardless of whether the member was convicted or acquitted . . . .").

[52] *See supra* notes 25 and 26.

[53] *See* 10 U.S.C. § 818 (2012) (stating that "only general courts-martial have jurisdiction over an offense specified in section 856(b)(2)," which includes penetrative offenses against adults and children under 10 U.S.C. §§ 920(a)-(b), 920b, 925).

[54] Though Coast Guard Area Commanders—uniformed officer GCMCAs—do not have to obtain additional permission, the

courts-martial against those accused of serious criminal offenses.

In contrast, the DOJ requires under its *Petite* Policy that any successive "prosecution must be approved by the appropriate Assistant Attorney General."[55] In *Rinaldi v. United States*, the DOJ honored the *Petite* Policy by moving to dismiss the federal conviction of Rinaldi, where the trial counsel "had not obtained the requisite approval" from the appropriate Assistant Attorney General.[56]

This Court noted that "the overriding purpose of the *Petite* Policy is to protect the individual from any unfairness associated with needless multiple prosecutions."[57] By requiring the lower court to allow withdrawal of Rinaldi's conviction—without itself examining whether the facts and circumstances of the successive prosecution met the *Petite* Policy—this Court vindicated the importance of obtaining high-level approval before a successive prosecution.

The *Petite* Policy constrains almost all federal "charging decisions" after a state prosecution.[58] It applies even if a prior state prosecution resulted in "dismissal or other termination of the case on the

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Coast Guard does have non-Area Commander GCMCAs, who must ask an Area Commander for permission. *Supra* note 50.

[55] *USAM*, *supra* note 9, § 9-2.031.

[56] 434 U.S. 22, 24 n.5, 24-25 (1977).

[57] *Rinaldi*, 434 U.S. at 31.

[58] *USAM*, *supra* note 9, § 9-2.031(B) (excepting cases "where the prior [state] prosecution involved only a minor part of the contemplated federal charges").

merits after jeopardy has attached," short of a conviction or acquittal.[59] Jeopardy attaches in civilian courts when the "jury is empaneled and sworn," or after "the first witness is sworn" in a bench trial.[60]

Substantively, the *Petite* Policy first requires a showing that the criminal "matter . . . involves a substantial federal interest."[61] Matters "within the national investigative or prosecutorial priorities established by the Department are more likely than others to satisfy this requirement."[62]

Second, "the prior prosecution" must have "left that [substantial federal] interest demonstrably unvindicated," for instance, by imposing a sentence "manifestly inadequate in light of the federal interest involved."[63] This must overcome a "presumption" that the "prior prosecution, regardless of result, has vindicated the relevant federal interest."[64]

Finally, the *Petite* Policy requires that "the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact" under a beyond reasonable doubt standard.[65]

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[59] *USAM* § 9-2.031(B)-(C).
[60] *Crist v. Bretz*, 437 U.S. 28, 37 n.15, 38 (1978).
[61] *USAM*, *supra* note 9, § 9-2.031(A).
[62] *Id.* § 9-2.031(D).
[63] *Id.* § 9-2.031(A).
[64] *Id.* § 9-2.031(D).
[65] *Id.* § 9-2.031(D) (citing *id.* § 9-27.220, comment ("[N]o prosecution should be initiated against any person unless the attorney for the government believes that the admissible evidence is sufficient to obtain and sustain a guilty verdict by an unbiased trier of fact.")).

2. Most military departmental limits on successive prosecutions are insubstantial compared to the DOJ's *Petite* Policy.

The Air Force has the most restrictive policy on successive prosecutions—authorizing them in "only the most unusual cases when justice and good order and discipline can be satisfied in no other way."[66] However, neither the Air Force nor other departments follow the *Petite* Policy conditioning a successive prosecution on admissible evidence probably sufficient to prove charges beyond reasonable doubt.[67]

The Army's successive court-martial regulation is less protective of an accused's rights than the *Petite* Policy. It does not presume that a state trial satisfies a military disciplinary interest.[68] Also, the Army only applies this policy to state trials where jeopardy attached "within the meaning of UCMJ, Art. 44."[69]

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[66] AFI 51-201, *supra* note 51, at 35, ¶ 2.18.3.

[67] Even after recent Congressional amendments, the advice from judge advocate prosecutors to the convening authorities who make all charging decisions, including successive courts-martial, is and will remain "*nonbinding*." *See* FY 2017 NDAA, § 5204, 130 Stat. at 2906-07 (amending 10 U.S.C. § 833 to require judge advocates to provide "non-binding guidance" to convening authorities based in part on the principles in the *United States Attorneys' Manual*, *supra* note 9, § 9-2.031(B)).

[68] *See* AR 27-10, *supra* note 48, at Ch. 4 ¶ 4-2 (stating that a soldier "who has been tried in a civilian court may, but ordinarily will not, be tried by court-martial . . . for the same act over which the civilian court has exercised jurisdiction," if the soldier's GCMCA "personally determine[s] that" a court-martial "is essential to maintain discipline in the command").

[69] *Id.* at 29 (citing 10 U.S.C. § 844 (2012)).

Jeopardy does not attach in a court-martial with a members panel until after introduction of evidence,[70] making the Army rule less protective of a military accused than the civilian protection in *Crist v. Bretz*.[71]

The Department of the Navy claims to restrict successive courts-martial to "unusual cases" where they are "essential in the interests of justice, discipline, and proper administration within the Naval service."[72] However, it also requires only one of three "criteria" for a GCMCA to approve a successive court-martial: that the "civilian proceedings concluded without conviction for any reason than acquittal," that a "unique military interest was not or could not be adequately vindicated," *or* that the "conduct leading to trial before a State . . . court has reflected adversely upon the Naval service."[73]

One author has observed that "[t]his last category" in the Navy successive courts-martial instruction seems to swallow the rule" because "virtually every crime reflects adversely upon the military."[74] The first category in this Navy regulation, that the "civilian proceedings concluded without conviction for any reason other than acquittal, is also broader than the *Petite* Policy in that the Navy

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[70] *United States v. Easton*, 71 M.J. 168, 170 (C.A.A.F. 2012).
[71] 437 U.S. at 37 n.15.
[72] JAGMAN, *supra* note 18, §§ 0124(a).
[73] *Id.* § (b) ("Referral for trial . . . within the terms of this policy shall be limited to cases that meet one or more . . . criteria[.]").
[74] Major Charles L. Prichard, Jr., *The Pit and the Pendulum: Why the Military Must Change Its Policy Regarding Successive State-Military Prosecutions*, 414 ARMY LAWYER 1, at 19 (Nov. 2007).

suggests that *any* incomplete civilian proceeding, including those in which jeopardy attached, could justify a successive court-martial.

Although the Coast Guard requires "complete justification as to why deviation from the general policy against second trials is appropriate,"[75] it "does not detail what the justification should include or what types of cases or circumstances might justify a successive prosecution."[76]

The typical military combination of a low-level for approval requiring little explanation leads to successive courts-martial without adequate justification. One author notes that in the case of Army Staff Sergeant David Tillery—tried in a successive court-martial after a trial judge dismissed a North Carolina state murder charge for "lack of evidence"[77] after a jury was empaneled—the "GCMCA testified that he felt punitive action was necessary, giving no further explanation" as to why he needed to convene a successive court-martial.[78] Staff Sergeant Tillery went from no criminal conviction, to serving a life sentence after his successive court-martial.[79]

In the case of Chief Williams, the Navy appears

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[75] COMDTINST M5810.1F, *supra* note 50, at 60-61 ¶ 4.D.1.
[76] Prichard, *supra* note 74, at 19.
[77] WRAL.COM, Man Accused of Murdering Lover's Husband Faces Court Martial (May 12, 2003), https://www.wral.com /news/local/story/105214/.
[78] Prichard, *supra* note 74, at 18 n.202 (citation omitted).
[79] *Tillery v. Shartle*, No. CV 16-0204-TUC-CKJ (LAB), 2016 WL 7229139, at *2 (D. Ariz. Dec. 14, 2016).

to have based its decision to successively court-martial him, at least in part on his choice of wardrobe during his state trial: his Navy uniform.[80] This sounds more like petty revenge, than of a substantial, unvindicated federal interest that would have been required under the *Petite* Policy.

3. The military departments do not enforce their proclaimed policies against successive prosecutions to the degree that the DOJ enforces the *Petite* Policy.

The DOJ, in *Rinaldi* and in many other cases,[81] has moved to vacate convictions after United States Attorneys have conducted successive prosecutions without following the *Petite* Policy. Though lower courts have held that defendants cannot force the DOJ to follow the Policy,[82] the Policy itself provides that with very few exceptions, the "United States will move to dismiss any prosecution governed by this policy in which prior approval was not obtained."[83]

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[80] *Williams*, 2013 WL 1808733 at *2 (noting Navy prosecutor at the state trial "later opined that the presence of the appellant in uniform and additional chief petty officers in uniform in the gallery had an untold impact on the jury members").

[81] *E.g.*, *Thompson v. United States*, 444 U.S. 248, 249 (1980) (per curiam) (listing cases).

[82] *United States v. Snell*, 592 F.2d 1083, 1088 (9th Cir. 1979) (noting a "defendant cannot invoke the *Petite* Policy as a bar").

[83] *USAM*, *supra* note 9, § 9-2.031(E) (excepting only unauthorized successive prosecutions where first, "the Assistant Attorney General retroactively" finds "that there [are] unusual or overriding circumstances justifying retroactive approval; and second, the prosecution would have been approved had approval been sought in a timely fashion").

In contrast to the *Petite* Policy, none of the military departments require dismissal of a court-martial conviction where a convening authority fails to comply with a departmental regulation. There are numerous examples of convening authorities simply disregarding departmental regulations,[84] with no remedial action by the government.[85] This shows that, unlike the DOJ's policy and practice, there is no meaningful constraint on the military's use of successive courts-martial. Accordingly, this Court should overrule the separate-sovereigns exception which enables this arbitrary government action.

II. THE SEPARATE-SOVEREIGNS EXCEPTION SHOULD BE OVERRULED BECAUSE IT ALLOWS FOR CONTINUED HARASSMENT BY SUCCESSIVE COURTS-MARTIAL OF RETIRED MILITARY, AND OF ACTIVE DUTY MILITARY WHOSE ENLISTMENTS ARE INVOLUNTARILY EXTENDED.

Military jurisdiction is status-based. Congress has subjected to military jurisdiction, among others,

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[84] *E.g.*, *Kohut*, 44 M.J. at 246-50 (convening authority failed to follow Navy JAGMAN instruction then in effect required the GCMCA to get "permission of the Judge Advocate General" to court-martial Fireman Kohut for assaults previously "the subject of a state criminal proceeding"); *United States v. Culpepper*, No. ACM 34058, 2002 WL 13154 at *2 (A.F. Ct. Crim. App., Dec. 11, 2001) (convening authority failed to obtain required permission from the Secretary of the Air Force to conduct court-martial for larceny of stolen property already subject to a state conviction).

[85] In fact, after *Kohut*, the Navy relaxed its rules for successive courts-martial, changing the JAGMAN to require notification by a GCMCA, rather than seeking approval. *See supra* note 18.

those on active duty, those retired from the active duty military, and those reservists on active duty.[86]

The successive sovereigns exception unjustly allows the military to prosecute an active duty retiree previously tried by a state court, even though this retiree's only real connections to the military are (1) the theoretical ability to be recalled to active duty,[87] and (2) a monthly pension.[88] In *Hennis*, the Army convened a successive court-martial twenty-one years after acquittal by a state court, and two years after his retirement.[89] As one author asked: "[w]hat special interest does the Army have in prosecuting someone who was no longer in the military for a twenty-one year old crime, especially when the Army did not pursue a court-martial when the crime occurred?"[90]

A. The military routinely places active duty members on "legal hold" to involuntarily extend enlistments for a court-martial.

An enlisted member of the military's contract ends on a specified date. However, for a member of the active duty forces to be discharged from an enlistment, he or she generally must first: (1) receive delivery of a valid discharge certificate; (2) have a

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[86] 10 U.S.C. § 802 (2012).
[87] 10 U.S.C. § 688 (2012) (allowing retiree recall in emergency).
[88] *See generally Barker v. Kansas*, 503 U.S. 594, 605 (1992) (holding that "[f]or purposes of [taxation], military retirement benefits" are "considered deferred pay for past services").
[89] 75 M.J. at 802.
[90] Prichard, *supra* note 74, at 16.

final accounting of pay; and (3) complete the 'clearing' process required under service regulations.[91]

Each department has regulations authorizing commands to stop the discharge of a member,[92] if they take an "action with a view to trial"—apprehension, imprisonment, "preferral of charges,"[93] or even just a "[c]riminal investigation[.]"[94] These regulations place a member in a "legal hold" status. There, they are still subject to court-martial while "awaiting discharge after expiration of [the] terms of enlistment."[95]

While on a legal hold, a member does not receive pay if placed in pretrial detention pending court-martial (unless later acquitted by court-martial).[96] Often the military imprisons or stations these members at distant bases, long after the member's enlistment contract has expired.

For instance, in *United States v. Webb*, Senior Airman Webb's enlistment expired October 23, 2008.[97]

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[91] *See United States v. Christensen*, 78 M.J. 1, 5 (C.A.A.F. 2018) (citing 10 U.S.C. § 1168 (2012)).

[92] *E.g.*, DEP'T OF THE NAVY, MILITARY PERSONNEL MANUAL (MILPERSMAN) § 1160-050, at 6, 8-9 (2007) (authorizing both "[i]nvoluntary extension[s]" of an enlistment "due to criminal proceedings," and "extension[s] for completion of U.S. civilian criminal proceedings").

[93] R.C.M. 202(c)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016).

[94] 67 M.J. 765, 766 (A.F. Ct. Crim. App. 2009).

[95] 10 U.S.C. § 802(a) (2012).

[96] *United States v. Fischer*, 61 M.J. 415, 421-22 (C.A.A.F. 2005).

[97] *Webb*, 67 M.J. at 766.

Even though the Air Force issued his discharge paperwork and a final accounting of pay, a military judge found continuing court-marital jurisdiction over Senior Airman Webb because his command started a criminal investigation and placed him on legal hold seven days before his enlistment was to end.[98]

B. The separate-sovereigns exception allows the military to place members facing state trials on "legal hold" for successive courts-martial, long after their enlistments expire.

The separate-sovereigns exception allows the military to take actions "with a view to trial" against members facing a state prosecution, and thereby retain them on legal hold even after their enlistments expire. For instance, in *United States v. Burke*, Kentucky charged Army Sergeant Burke four times with a double murder.[99] After four mistrials between 2007-2011, the State gave up.[100] Sergeant Burke's "enlistment [had] ended while he was in the custody of civilian authorities."[101] However, because of the Army's ability to place Sergeant Burke on legal hold:

> Burke was never processed out of the

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[98] *Id.* at 768-69, 772.

[99] *United States v. Burke*, No. 20120448, 2015 WL 5472729, at *1 (A. Ct. Crim. App. Feb. 26, 2015), *aff'd*, 75 M.J. 26 (C.A.A.F. 2015).

[100] *Id.*

[101] Charles Gazaway, *Military panel finds murder suspect Brent Burke guilty on all charges*, WAVE 3 NEWS (May 8, 2012), http://www.wave3.com/story/18184922/military-panel-reaches-finding-in-court-martial-of-double-murder-suspect-brent-burke.

> Army [and] still considered to be on active duty. He was taken into custody by military police and returned to Fort Campbell where the government filed the murder charges against him. He was held in . . . [j]ail while awaiting general court-martial."[102]

The Army charged and convicted Sergeant Burke for double murder, among other charges, long after his enlistment had expired.[103]

In *United States v. Christensen*, Private First Class Christensen's command had mailed his discharge paperwork and processed him out of the Army.[104] However, when civilian authorities jailed him on suspicion of sexual assault, a senior prosecutor requested the Army suspend the final accounting of Christensen's pay, testifying that he wanted to maintain military jurisdiction so he could "confirm that the civilians were going to prosecute this [sexual assault case] in a way that we felt was appropriate."[105]

After civilian authorities discussed allowing Private First Class Christensen to plead to a lesser charge, the Army court-martialed him.[106] Though the CAAF vacated the conviction for lack of jurisdiction,[107] the senior prosecutor's testimony exemplifies how the military uses the separate-sovereigns exception and

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[102] *Id.*
[103] *Burke*, 2015 WL 5472729, at *1.
[104] 78 M.J. at 2-3.
[105] *Id.* at 3, n.2.
[106] *Id.* at 3.
[107] *Id.* at 6.

successive courts-martial to exploit discharge criteria. It also shows how the separate-sovereigns doctrine makes it practically impossible for a military defendant to reach a plea deal protecting his interests in a state trial, where the military can retain the defendant and try the same acts by court-martial even long after an enlistment ordinarily should have ended.

In the case of Petty Officer Greening, the Navy engaged in a similar course of conduct. The Commonwealth of Virginia indicted Petty Officer Greening for an accidental shooting on August 7, 2013.[108] After his enlistment expired and while Virginia's proceedings continued, military authorities involuntarily "extended [him] on active-duty[.]"[109]

Even though military authorities did not clarify that the extension was for the purpose of a successive court-martial—thereby failing to comply with Navy internal regulations for nearly a year—the military court held that Petty Officer Greening suffered no harm because the Navy's legal hold regulations were not intended to "protect" his "rights."[110] Petty Officer Greening "entered into a plea agreement with the Commonwealth to involuntary manslaughter," and received "three years' confinement, with two years and six months suspended."[111]

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[108] *Greening*, 2018 WL 154779, at *1.
[109] *Id.* at *2. Petty Officer Greening initially signed "voluntar[y]" requests to stay on active duty, but after he later refused to sign additional such requests, his command required him to sign involuntary extensions of his active duty enlistment. *Id.*
[110] *Id.* at *5 (citing *Kohut*, 44 M.J. at 250).
[111] *Id.* at *1.

After Petty Officer Greening's release from jail, the Navy jailed and successively court-martialed him for involuntary manslaughter because of his status as an involuntarily extended active duty member of the military. He pleaded guilty, again: and received jail time again—thirty-nine months' confinement from the Navy, with no portion suspended.[112]

These cases demonstrate how the military exploits the separate-sovereigns exception to involuntarily retain members on active duty for successive courts-martial. As this Court noted in *Bartkus v. Illinois*, "at some point the cruelty of harassment by multiple prosecutions by a State . . . offends due process."[113] Being involuntarily retained in the military for a successive court-martial, or successively court-martialed as a retiree are points at which this harassment is unjustifiable, and which support repeal of the separate-sovereigns exception.

III. THE FACTUAL PREMISE FOR TRIAL BY COURT-MARTIAL UNDER THE SEPARATE-SOVEREIGNS EXCEPTION IS OBSOLETE, CONTRARY TO THE FRAMERS' INTENT, AND SHOULD BE OVERRULED.

A. Using the separate-sovereigns exception for successive courts-martial is inconsistent with the Framers' intent.

As the Court noted in *Reid v. Covert*, during

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[112] *Greening*, 2018 WL 154779, at *1.
[113] *Bartkus v. Illinois*, 349 U.S. 121, 127 (1959).

the "lifetime" of "those who wrote the Constitution," court-martial jurisdiction in Great Britain was incredibly narrow—it had not even covered the right to "try soldiers for any offenses in time of peace."[114] Indeed, "the trial of soldiers by courts-martial and the interference of the military with the civil courts aroused great anxiety and antagonism not only in Massachusetts but throughout the colonies."[115]

The Articles of War originally authorized jurisdiction over only "offenses against civilians" of a military nature, and further restricted this to where "no application for a civilian trial was made by or on behalf of the injured civilian."[116] These Articles, enacted by the Continental Congress and used through passage of the Constitution and Bill of Rights[117] required military authorities to "deliver over" to "the civil magistrate" any "officer or soldier" who "committed any offense against the persons or property of the good people of any of the United American States," or else the military authorities themselves would be punished.[118]

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[114] 354 U.S. 1, 23 (1957) (discussing English common law traditions prior to 1713) (four-vote majority). *But see Solorio v. United States*, 483 U.S. 435, 443 (1987) (stating that the British Articles of War of 1774 "had jurisdiction over offenses punishable under civil law") (citation omitted).

[115] *Reid*, 354 U.S. at 28.

[116] *Solorio*, 483 U.S. at 444.

[117] *See* Act of Sept. 29 1789, Ch. 25, 1 Stat. 95 (passing Articles of War into law, in the first session of the first Congress).

[118] W. WINTHROP, MILITARY LAW AND PRECEDENTS 964 (2d ed. 1920) (quoting American Articles of War of 1776, § X, Art. 1 (Sept. 20, 1776)).

This Court noted in *Reid* that "[i]t was not until 1863 that Congress" greatly expanded the jurisdiction of courts-martial when it "first authorized the trial of *soldiers, in wartime,* for *civil crimes* . . . by courts-martial."[119]

However, even after this great expansion of court-martial jurisdiction, the "prohibition on double jeopardy" largely continued to "protect[the] liberty" of servicemembers "from government overreach."[120] Colonel Winthrop, referred to by this Court as the "Blackstone of Military Law,"[121] wrote in his 1920 treatise that the "plea of former trial for the same offense"—double jeopardy—*did preclude successive courts-martial* for these civil crimes:[122]

> [A] soldier convicted by a general court-martial, under Art. 21 or 22, of an offering of violence or mutinous act which resulted in the killing of a superior officer, would remain liable to an indictment for murder in a State or U.S. Court, on account of the homicide involved; and vice versa. [But w]here indeed the offenses are crimes of which military courts are invested with jurisdiction concurrently with the

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[119] 354 U.S. at 23 n.42 (emphasis added, citation omitted).

[120] Amicus Brief of Constitutional Accountability Center and Cato Institute at 7, *Gamble v. United States*, No. 17-646 (Dec. 4, 2018) (citation omitted).

[121] *Ortiz*, 138 S. Ct. at 2175.

[122] W. WINTHROP, *supra* note 118, at 259-65.

> criminal courts, (as for example, the crimes cognizable by courts-martial under Art. 58,[123] in time of war) the same are not distinct but identical in law, *and an acquittal or conviction of one of such offenses . . . in a civil court, will be a complete bar to a prosecution of the same in a military court, and vice versa.*[124]

In other words, the civilian trial for murder would not preclude a court-martial for mutiny—a uniquely military offense. However, the civilian trial would bar a successive court-martial for murder. This is because murder was a "common law" offense,[125] only punishable by court-martial in wartime under the Fifty-Eighth Article of War. Unfortunately, by the time this Court fully embraced the separate-sovereigns exception in the 1950s,[126] military courts

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[123] WINTHROP, *supra* note 118, at 666-67 ("Art. 58. In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault, and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punished by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory or District in which such offense may have been committed.").

[124] *Id.* at 264-65 (emphasis added).

[125] *Id.* at 671.

[126] *See* Reply Brief, *supra* note 22, at 12 ("The [separate-sovereigns] doctrine fully crystallized in a pair of 1959 cases, *Bartkus*, 359 U.S. 121, and *Abbate*, 359 U.S. at 196, which

"lost the plot" of this liberty-preserving distinction.

B. Courts-martial have transformed from summarily punishing military offenses to judicially enforcing a comprehensive criminal code duplicative of state law in cooperation with state investigators.

Successive courts-martial should also be found unconstitutional because the "facts have so changed"—from the separate military justice system that existed at the time of the Framers to the integrated system of today—"as to have robbed the old rule of significant . . . justification."[127]

The first changed fact is that court-martial jurisdiction has widely expanded—from trying only military offenses, to trying servicemembers for "garden-variety crimes"—no matter how "unrelated to military service."[128] Court-martial jurisdiction is *even more* expansive than the general federal criminal jurisdiction, which itself "has become so bloated that 'the federal government has [now] duplicated virtually every major state crime.'"[129] Courts-martial may try a defendant for "all disorders and neglects to the prejudice of good order and discipline in the armed

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blessed, respectively, state prosecution following a federal conviction and federal prosecution following a state acquittal.").

[127] Brief for Petitioner at 42 (citing *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 855 (1992)).

[128] *Ortiz*, 138 S. Ct. at 2174.

[129] Brief for Petitioner at 43 (citing Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 22 (1997)) (alteration in petitioner's brief).

forces;" for any such acts or omissions which "bring discredit upon the armed forces;" *and*, for *any* non-capital violation of *state* or federal law.[130]

The second changed fact is the heightened degree of state and military cooperation: "military criminal investigators typically work very closely with state investigators when crimes involve both jurisdictions."[131]

This greatly expanded scope of military justice, enforced by deep cooperation between state and military authorities, "makes it particularly easy for federal and state governments to work together to subject individuals to repeated harassment for a single offense . . . the type of government overreach that the Double Jeopardy Clause was adopted to prevent."[132] For instance, in the case of Master Sergeant Hennis, "the state did all the investigative work and seems to have turned to the Army as its agent in carrying out the second trial only because it is constitutionally barred from doing so."[133] And in the case of Staff Sergeant Tillery:

> [T]he state . . . did all the investigative work and handed the cases to the Army six months after [Staff Sergeant]

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[130] 10 U.S.C. § 934 (2012).

[131] Prichard, *supra* note 74, at 16.

[132] Amicus Brief of Constitutional Accountability Center and Cato Institute at 10 (citing Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 9-10 (1995) (noting "the increased level of federal-state cooperation in enforcing criminal laws")).

[133] Prichard, *supra* note 74, at 16.

> Tillery's acquittal and two and a half years after the crime. The Army retried the state's case with the same witnesses, no additional investigation, and with the state's record of trial in the Army prosecutor's hands. Did the Army truly have a special interest separate from the state's, or was this a thinly veiled attempt by the state to prosecute [him] again by using the Army to avoid the Double Jeopardy Clause?[134]

Today's broad court-martial jurisdiction would be unrecognizable to the Framers. The military departments, able to administratively separate—fire for cause—members who committed civilian crimes,[135] do not need to successively court-martial these military members under the separate-sovereigns exception. This exception only serves to cause a "continuing state of anxiety and insecurity"[136] amongst those who, whatever their other failings may be, bravely volunteered to serve our country.

CONCLUSION

This Court should find that the separate-sovereigns exception, which permits the disfavored treatment of servicemembers at successive courts-

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[134] Prichard, *supra* note 74, at 16-1s7.

[135] *See, e.g.*, DEP'T OF THE NAVY, MILPERSMAN, §§ 1900-1999 (governing administrative separations of enlisted sailors); DEP'T OF THE NAVY, Secretary of the Navy Instruction 1920.6C (Sept. 20, 2011) (authorizing administrative separations of naval officers).

[136] Brief for Petitioner at 27 (quoting *Green v.* 355 U.S. at 187).

martial—just because they volunteered to serve our country—is unconstitutional.

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